and of which he had "entire control and management . . . and determined what claims should be put in suit," it was clear that the second maker could not avail himself of the statute of limitations. His trustee, therefore, in a general deed of assignment subsequently made by him, paid the debt in full, and sued the co-maker for contribution. It was held, and apparently on correct principles, that there could be no recovery. Here, it will be observed, the paying debtor had lost the benefit of the statute by his own laches—making the "different question" suggested in the New Hampshire case. In the Virginia case, however, the court lays down the principle too broadly, namely, that "the payment must have been made upon a debt for which the defendant [sought to be charged by contribution] *was legally liable at the time of the payment,* and which the obligor was compellable to pay, and not upon a debt which was barred as to the obligor sought to be charged." As already shown, and as brought out at length in the Texas case referred to, it may frequently happen that the co-promisor may be compelled to contribute to a payment made after the claim is barred as to himself.

The true principle would seem to be that wherever a surety pays a debt which he is compellable to pay, he may, in an action brought within proper time thereafter, compel exoneration or contribution from his principal or co-surety, notwithstanding the debt so paid was then time-barred as to the defendant of whom contribution is sought—provided the continued liability of the paying surety does not arise from some default of his own, or from some voluntary act, which could not have been compelled by the creditor under the contract as originally assumed.

It may be noted that by statute in Virginia it is provided (in substance) that no acknowledgment or promise by one of two or more joint contractors shall revive or extend the period of limitation as to the other contractor or contractors. Va. Code, sec. 2923.

SANDS' ADMINISTRATOR v. DURHAM.*

Supreme Court of Appeals: At Richmond.

March 14, 1901.

1. SUBROGATION—*When doctrine applicable.* Subrogation is the creature of equity, and essential justice is its object. It exists independently of the mere contractual relations of the parties, and, in its practical application, has been deemed broad enough to cover every instance in which one party has been required to pay a debt for which another is primarily answerable, and which, in equity and good conscience, ought to be discharged by the latter.
2. SUBROGATION—*Joint obligors—Partners—Payment of another's share.* Among joint obligors and partners each is primarily bound for his own share, and secondarily liable for the share of the other; and, although all are bound to the obligee, if one pays the share of another, all the essential conditions are present which entitle the former to be subrogated to the rights of the creditor against the latter.

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* Reported by M. P. Burks, State Reporter.

3. SUBROGATION—*Partnership—Excessive payments by one partner—Settlement of partnership accounts.* Where a partnership has been dissolved and the social assets exhausted, and judgments subsequently recovered against the members of the firm on partnership debts have been paid by one of the partners, who is not in arrears to the firm, out of his individual means, and this is shown by a settlement of the partnership accounts, the partner who has paid the judgments is entitled to be subrogated to the rights of the creditors whose judgments he has satisfied against the real estate of his co-partner, in the hands of a subsequent purchaser, to the extent to which his payments exceed his proportional part of the liability.

Appeal from a decree of the Circuit Court of Giles county, pronounced on the — day of May, 1899, in a suit in chancery, wherein the appellee was the complainant and the appellants and others were the defendants. *Reversed.*

The facts of this case, so far as are necessary to a clear understanding of the opinion of the court, are as follows: On January 1, 1886, J. H. Durham, D. L. Whittaker and D. A. Early entered into a mercantile co-partnership, under the style of D. L. Whittaker & Co. D. L. Whittaker furnished a stock of goods valued at three thousand dollars. Durham and Early were to pay Whittaker interest on two-thirds of that amount, and each party was to share equally all profits and losses. On the dissolution of the firm, Whittaker was to receive back his input of three thousand dollars, or so much thereof as had not been previously withdrawn by him. The business proved unprofitable, and, having contracted a large number of debts, the partnership was dissolved about August, 1887. The most of these debts were shortly thereafter reduced to judgments against the firm.

Before the dissolution of the firm, however, D. L. Whittaker had withdrawn from the firm the whole of his input of three thousand dollars. The assets of the firm, at the time of the dissolution, were comparatively of little value. They were placed in the hands of Durham, who was to collect and apply them to the partnership debts. Durham used the firm's assets to pay those debts as far as available. In addition to this, he paid out of his individual means a large number of the judgments against the firm, and also a large number of the firm's debts which had not yet been reduced to judgment. At the time that these judgments were recovered, D. A. Early, a member of the firm, owned a tract of 126 acres of land in Giles county, known as "the mountain tract," and five-eights interest in three other tracts containing, respectively, eighty-one acres, nineteen acres and forty-four acres.

This five-eighths interest Early and wife conveyed to Ann Jane Sands, after the judgments aforesaid had been duly docketed.

In October, 1895, the present suit was brought by J. H. Durham for the purpose of having a settlement of the partnership accounts of the firm of D. L. Whittaker & Co., and also of being subrogated to the rights of creditors in the judgments aforesaid against the lands which had been aliened by Early. The bill sets forth the facts hereinbefore detailed, and especially the recovery of the judgments against the firm; the payment of those judgments by him out of his individual property; the deed aforesaid by Early and wife to Sands, and the further fact that D. L. Whittaker, the other member of the firm, was wholly insolvent. Both Early and Whittaker had died before the institution of this suit, but all persons necessary or proper were made parties defendants to the bill. The prayer of the bill, after making parties, is for the settlement of the partnership accounts of the firm of D. L. Whittaker & Co., and, if upon such settlement it should appear that Durham had paid off more than his part of the said judgments, then, to the extent that he had paid on said judgments sums that should have been paid by Early, that he be subrogated to the rights of the creditors whose judgments he had thus paid off, and that "said rights and liens be enforced against the said interest owned by the said D. A. Early in the lands hereinbefore referred to at the time of and after the rendition and docketing of said judgments." The case was referred to a commissioner to settle the partnership accounts, and the standing of each member with the firm. The commissioner reported that the firm was indebted to Durham in the sum of $3,732.-87, not including interest, of which $3,028.20 was for judgments against the firm paid off by him. He also reported that D. L. Whittaker and D. A. Early were each indebted to the firm. Exceptions were filed to this report by the complainant and others, but were overruled by the court. The court decided that the appellee, Durham, was entitled to be substituted to the lien of the various creditors mentioned in the decree whose judgments against the firm were recovered and docketed prior to the recordation of the deed from D. A. Early and wife to Ann Jane Sands, to the extent that he had paid an excess of his share of the liabilities of the firm. From that decree this appeal was taken.

J. C. Wysor, for the appellants.

Henson & Mason and *S. W. Williams*, for the appellee.

WHITTLE, J., delivered the opinion of the court.

An opinion was handed down in this case in June, 1900 (2 Va. Sup. Ct. R., p. 361), but this court not being satisfied with the conclusion then reached, a rehearing was granted.

There is but this single question presented for decision: Where a partnership has been dissolved and the social assets exhausted and judgments subsequently recovered against the members of the firm on partnership debts have been paid by one of the partners, who is not in arrears to the firm, out of his individual means, and this is shown by a settlement of the partnership accounts, is the partner who has paid the judgments entitled to be subrogated to the rights of the creditors whose judgments he has satisfied against the real estate of his co-partner, in the hands of a subsequent purchaser, to the extent to which his payments exceed his proportional part of the liability?

The doctrine of subrogation is independent of any mere contractual relations existing between the parties to be affected by it, and involves the equitable principle that where one who is secondarily liable has paid the debt of another, who is primarily liable therefor, he will, in equity, be substituted to all the rights and remedies of the creditor against the party whose share of the joint liability he has been compelled to discharge. Sheldon, in his work on Subrogation, states the doctrine thus: "The usual rule is that one of several joint debtors will, as against his co-debtors, ordinarily be subrogated to the securities and means of payment of the common creditor whom he has satisfied, so as to enable him to recover from his co-debtors, by means thereof, their proportional shares of the indebtedness which he has discharged; and this, as in other cases of subrogation, arises rather from natural justice than from contract. Each joint debtor is regarded as a principal debtor for that part of the debt which he ought to pay, and as surety for his co-debtors as to the part of the debt which ought to be discharged by them." Sheldon on Subrogation, sec. 169, citing *Morrow* v. *Peyton*, 8 Leigh, 54; *Boyd* v. *Boyd*, 3 Gratt. 113.

Subrogation has been denominated as one of the benevolences of the law, created, fostered and enforced in the interest and for the promotion of justice.

In England, and in a few of the States of the Union which have adopted the English rule, the application of the doctrine is very much restricted. Indeed, prior to an act of Parliament (19 and 20 Vict. C. 97) the courts had held that even a surety who satisfied a judg-

ment against himself and his principal was not entitled to be subrogated to the rights of the creditor, and to have the judgment kept alive for his benefit (*Copis* v. *Middleton* 1 T. &. R. 229; *Hodgson* v. *Shaw*, 3 My. & K. 190); but by the act of Parliament aforesaid the doctrine was extended to sureties.

With the exception of the courts of Alabama, Vermont and North Carolina, the English rule has not been followed in this country.

In most of the other States it has been extended until, in its practical application, it has been deemed broad enough to cover every instance in which one party has been required to pay a debt, for which another is primarily answerable, and which in equity and good conscience ought to be discharged by the latter.

In no other jurisdiction has the doctrine been more firmly adhered to or more liberally expounded and applied, to meet the exigencies of particular cases, than in Virginia.

In *Powell* v. *White*, 11 Leigh, 309, this court expressly repudiated the doctrine of *Copis* v. *Middleton* and *Jones* v. *Davids*. In a review of these cases found in a note to *Dering* v. *Earl of Winchelsea*, 1 L. C. in Eq., pt. 1, 140, it was remarked: "In the more recent case of *Powell* v. *White*, 11 Leigh, 309, the decisions in *Copis* v. *Middleton* and *Jones* v. *Davids*, were thoroughly examined in the Court of Appeals, and the Virginia practice was vindicated against the authority of Lord Eldon, with distinguished and convincing ability."

This court said in *Enders* v. *Brune*, 4 Ran. 447: "It has nothing of form, nothing of technicality, about it; and he who in administering it would stick in the letter, forgets the end of its creation and perverts the spirit which gave it birth. It is the creature of equity, and real essential justice is its object."

In *Tompkins* v. *Mitchell*, 2 Ran. 428, it was enforced in behalf of the principal debtor against a co-debtor, where the former had paid more than his proportion of the debt, by substituting him to the rights of the creditor whose vendor's lien he had discharged, the court holding that, as between themselves, each was a principal debtor for his one-half of the debt; and the one paying more than one-half was surety as to the excess paid by him.

In *Wheatly* v. *Calhoun*, 12 Leigh, 264, the parties were partners. The original debt was a joint obligation, but not a partnership debt. Subsequently the firm made its notes therefor and secured them by a lien on the property for which the debt was created. Afterwards one

of the partners paid the entire debt, and he was subrogated to the lien of the creditor whose debt he had satisfied.

In *Gatewood* v. *Gatewood*, 75 Va. 415, it was declared that subrogation would be enforced in favor of sureties *and others* who are required to pay in order to protect *their own interest.*

In *Dobyns* v. *Rawley*, 76 Va. 537, the consideration of real estate sold and conveyed by Fulton to Rawley and Davis jointly, was $5,000, for the payment of which they executed their joint bonds. In a subsequent division of the land between the purchasers, Rawley's parcel was rated at $3,000 and Davis' at $2,400, and in this proportion they were to discharge their joint indebtedness to Fulton. It was held that the legal effect of the arrangement was, that as between the two purchasers and in relation to each other, they were principal debtors for their respective portions of the purchase money, and each was surety for the other's portion, and that if either paid more than his agreed share, he became entitled to all the rights and remedies of a surety—to subrogation among the rest—against the other for repayment of such excess.

This principle was recognized in *Horton* v. *Bond*, 28 Gratt. 825, as the true ground for substitution to enforce contribution among co-sureties. It was there said: "Sureties are not only sureties for the principal debtor for the whole debt; but, as amongst themselves, each is surety for the other to the extent of the excess of the whole debt beyond his proportionate part thereof."

In *Pace* v. *Pace*, 95 Va. 792, it was held that the liabilities of a decedent's estate, and the rights of his creditors, are fixed by his death. If at that time a creditor has the right to prove a debt against a decedent's estate for which the decedent and another are bound as sureties, and subsequently the co-surety pays the debt, he is substituted to the right of the creditor, and may prove the whole debt against the estate of the decedent, and receive dividends thereon until one-half of the debt is paid, although the estate of the decedent will not pay his debts in full.

Buchanan v. *Clark*, 10 Gratt. 164, is relied on as sustaining the contention that subrogation does not obtain amongst partners. The facts of that case are as follows: K, B and G, who had formed a partnership for the purchase and sale of cattle, executed a joint bond to C. Cattle were sold, and C was supplied with money arising from the sales for the purpose of paying the bond to C and all other partnership debts. It was agreed that G should be the principal, and K and

B sureties only, for said debts. The bond was not paid, and C recovered judgment thereon against K, B and G. G was insolvent, and K and B satisfied the judgment. Subsequently to the recovery of said judgment G sold certain real estate; and K and B filed a bill in equity against C and his alienees, setting forth the foregoing facts and praying that they might be subrogated to the rights of C under the judgment. The court held that it was competent for K, B and G to contract that, as between themselves, G should be principal and K and B his sureties; that as between themselves K and B were entitled to be subrogated to the lien of the judgment creditor; and that they were equally entitled against the purchasers from G, who did not show a better equity. The court said: "I do not think, therefore, that there is anything in the objection that the debt when contracted was a partnership debt, and that with respect to the creditor it retained its original character. As between themselves they occupied the relation of principal and sureties.

It will be observed, the court was dealing with a case of "Convention Subrogation," and confined its decision to the case in hand without intimation as to whether *the general doctrine of subrogation* would or would not obtain among partners.

Bispham's Principles of Equity is also relied on to show that the doctrine does not apply to partners, and that author says (at sec. 337): "The right will not, however, exist between parties who are equally bound—as, for example, co-partners, co-obligors and co-contractors, except, of course, by virtue of special contract."

His statement is general, is not confined to co-partners, but embraces all co-contractors. And, as has been seen from the authorities reviewed, it is not, without qualification, a correct exposition of the Virginia doctrine. Of course, so long as such parties remain *equally bound*, the right does not attach; but they cease to *be equally bound* when one obligor discharges an obligation resting upon himself and his co-obligor. Both are bound to the obligee; but *inter se*, each is primarily, *not equally liable*, for his own share, and secondarily liable for the share of the other; and when he pays the share of such other, all the conditions essential for the application of the doctrine arise.

In *Baily* v. *Brownfield*, 8 Harris (Pa.) 41, cited to sustain the text, there is an *obiter* to the effect that a partner who has paid a partnership debt cannot be substituted to the creditor's rights. But in that case there had been no settlement of partnership accounts; and there was nothing to show that the partner asserting the right of subro-

gation had paid more than his share. It was, therefore, properly denied.

In the later case of *Fessler* v. *Hickernell*, 82 Pa. St. R. 150, subrogation was denied one partner against another, for the reason that until there had been a settlement of partnership accounts there was no means of ascertaining whether any, and if any, what balance was due to the partner demanding subrogation. But the right of a partner, who had been shown by a settlement of partnership accounts to have paid more than his share, was conceded in that case.

In the still more recent case of *Akerman's Appeal*, 106 Pa. St. Rep. 1, subrogation was allowed between principal debtors, the court holding that they were principals, so far as their creditor was concerned; but each was surety as to the share of the other.

Thus it appears, that the Pennsylvania cases do not sustain the general proposition laid down by Bispham; but are in accord with the decisions of this court.

In *Sells* v. *Hubbell*, 2 Johnson's Chy. R. 394, Chancellor Kent said: "The debt of Sells was the debt of the co-partnership of Bedient & Hubbell. It was the common equal debt of both partners, and the consideration for which it was created is presumed to have enured equally to the benefit of both, and the contribution ought to be equal. The estate of each partner ought to be charged with the debt in equal portions, provided their interests in the co-partnership were equal, and their accounts as between each other were equal. This is the intendment, in the first instance; and it would be a thing almost of course for equity to allow the representatives of a deceased partner who had to pay the whole debt to be substituted in the place of the creditor, in order to recover, from the surviving partner, or his estate, *a moiety* of what they had paid. Nothing could stay this proceeding but the allegation of the surviving partner that he was the creditor partner, and that the estate of the deceased partner owed him a balance as much or more than it had been obliged to pay. This would render it necessary to take and state an account between the partners, before this court could interfere, in any way, to enforce the claim for contribution."

In the case under consideration, the partnership had been dissolved, the social assets had been exhausted in the payment of partnership debts, and a settlement of the partnership accounts had been made, from which it appeared that the appellee, J. H. Durham, was in advance to the firm and with his individual means had paid the judgments against it. Under these circumstances, the Circuit Court was

of opinion, and decreed, that appellee was entitled to be subrogated to the rights of the judgment creditors, whose liens he had discharged; and to subject the real estate owned by his co-partner, D. A. Early, at the date of the recovery and docketing of said judgments, to their satisfaction.

This court is of opinion there is no error in said decree, and that it ought to be affirmed. *Affirmed.*

NOTE.—The opinion in this case is notable, not only as being the first delivered by Judge Whittle since his recent accession to the bench, but as a reversal by a unanimous court of a previous unanimous decision by the same court in the same case. The previous decison was criticised in our August number (*ante* p. 253). We concur in the views so well expressed in the opinion.

BRIGGS V. COOK.*

Supreme Court of Appeals: At Richmond.

March 14, 1901.

1. PLEADING—*Set-off—Sec. 3299 of Code—Replication—Jeofails.* By the express terms of sec. 3300 of the Code, every issue in fact upon a plea of set-off under sec. 3299 must be upon a replication that the plea is not true. The statute of jeofails does not apply to the omission to file such replication.
2. PLEADING—*Motions—Set-off under Code, sec. 3299—Failure to reply—Verdict.* In a proceeding by motion to recover a judgment for money, the defendant pleaded *non-assumpsit* and a special plea of set-off under sec. 3299 of the Code. Issue was taken on the plea of *non-assumpsit*, but no replication was filed to the special plea and no evidence offered thereunder. The jury was sworn to try the issues joined. After the verdict for the plaintiff, the defendant moved to set it aside because no issue had been joined on the special plea.
   Held: The motion came too late. The defendant had the right to demand a replication, and, having failed to do so, he is deemed to have consented to a trial on the pleadings as they were.
3. APPEAL AND ERROR—*Failure to give nominal damages.* The failure to give nominal damages, unless it be upon a matter which involves the settlement of a right other than a right to recover damages, is not a ground for reversal.
4. PLEADING—*Motions—Latitude.* In a proceeding by motion, much greater latitude is allowed in pleading than in common law actions.

Error to a judgment of the Court of Law and Chancery for the city of Norfolk. *Affirmed.*

Edward R. Baird, for the plaintiff in error.

H. A. Brinkley and *E. C. Irvin,* for the defendant in error.

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* Reported by M. P. Burks, State Reporter.